BRF120

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

JESUS BAZAN, JR., MANUEL ALEMAN
and GRACIELA FLORES
Petitioners

VS.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
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ATTORNEY FOR PETITIONERS

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SUPREME COURT OF THE UNITED STATES

No. A-611

JESUS BAZAN, JR., MANUEL ALEMAN AND GRACIELA FLORES,

Applicants,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 29, 1987.

/s/ Byron R. White
Associate Justice of the
Supreme Court of the
United States

Dated this 23rd
day of February, 1987.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85 2751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GRACIELA FLORES,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

---

ON SUGGESTION FOR REHEARING EN BANC

(Opinion December 29, 5 Cir., 1986, _____F.2d____)

(February 12, 1987)

Before CLARK, Chief Judge, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

(X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules

of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas M. Reavley
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2751

D. C. Docket No. CR-B-85-366-01

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS BAZAN, JR.,
MANUEL ALEMAN, and
GRACIELA FLORES,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

Before CLARK, Chief Judge, REAVLEY, and WILLIAMS, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the District Court in this cause are affirmed.

December 29, 1986

ISSUED AS MANDATE: JAN 30 1987 - as to Bazan & Aleman only.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2751

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JESUS BAZAN, JR., MANUEL ALEMAN,
and GRACIELA FLORES,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(December 29, 1986)

Before CLARK, Chief Judge, REAVLEY and WILLIAMS, Circuit Judges.

REAVLEY, Circuit Judge:

Jesus Bazan, Manuel Aleman, and Graciela Flores were each convicted on four

drug counts: conspiracy to possess with intent to distribute over one kilogram of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(A); possession with intent to distribute over one kilogram of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A); conspiracy to possess with intent to distribute over fifty kilograms of marijuana in violation of 21 U.S.C. §§ 846, 841(a)(1), 841(b)(1)(B); and possession with intent to distribute over fifty kilograms of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B). Appellants raise both independent and overlapping grounds for reversal, four of which we address here: that evidence used against appellants was obtained by means of an illegal search; that prosecutorial misconduct at trial warrants reversal; that the convictions of Graciela Flores on two conspiracy counts and on two substantive

counts violate the double jeopardy clause of the Fifth Amendment; and that the initial arrest of Flores was illegal because not supported by probable cause. We find merit in only the third contention that challenges Flores' conviction of two conspiracies; we remand for resentencing of Flores based on only one conspiracy. Otherwise the convictions are affirmed.

Facts

Bazan was the owner of a 547 acre ranch in a remote area of Starr County, Texas close to the Mexican border. On June 6, 1985, at 2:30 A.M., Arturo Garza, a neighbor of Bazan's, was awakened by the entry of a tanker truck to the Bazan ranch. Garza dressed quickly and followed the truck on foot, entering Bazan's property by crawling under a barbed wire fence. At trial, Garza testified that, standing thirty yards from the ranch house, he saw Bazan, Aleman, and

Flores loading boxes onto the tanker, and that two hours later he followed the tanker as it left the ranch. He then telephoned Drug Enforcement Agent Mathews, describing the vehicle and saying it was "loaded." At 6:30 A.M. the vehicle was intercepted by border patrol agents, and its driver, appellant Manual Aleman, was arrested. Agent Mathews then telephoned other agents to secure the ranch and arrest Bazan. After a futile attempt to escape in a pickup truck by cutting part of the wire fence surrounding the ranch, Bazan and Flores were arrested. The tanker truck was taken to DEA headquarters, where a search of its contents revealed 125 pounds of marijuana and 693 pounds of cocaine, samples of which were admitted into evidence at trial.

The jury found appellants guilty on all four counts as charged, and the district court entered judgment on the verdict.

Discussion

I. An Illegal Search?

Appellants filed a pretrial motion to suppress "the evidence and testimony" of Garza, on the ground that his entry to the ranch constituted an illegal search under the Fourth Amendment. The district judge denied the motion, citing two reasons in his memorandum opinion: first, that Garza was not a government agent, and, second, that this case is covered by the open fields exception to the Fourth Amendment prohibition on warrantless searches, as enunciated in Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). Since we hold that Garza was not a government agent, we need not here reach the open fields question.

A wrongful search or seizure conducted by a private party does not violate the Fourth Amendment, and "such private

wrongdoing does not deprive the government of the right to use evidence." Walter v. United States, 447 U.S. 649, 656, 100 S.Ct. 2395, 2401, 65 L.Ed.2d 410 (1980). The question is whether, when Garza entered the Bazan ranch, he "must be regarded as having acted as an 'instrument' or agent of the state." Coolidge v. New Hampshire, 403 U.S. 443, 487, 91 S.Ct. 2022, 2049, 29 L.Ed.2d 564 (1971).

Appellants' argument that Garza must be regarded as an agent of the government is based on an analysis propounded by the Ninth Circuit. In United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982), the court held that "two critical factors in the 'instrument or agent' analysis are: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts

or to further his own ends." For purposes of reviewing this argument we will assume the adequacy of this formulation. Appellants take it as evident that Garza's intent was "purely to aid law enforcement officers." They claim that the only issue is whether the government knew of and acquiesced in the intrusive conduct. In support of their position, appellants contend that Garza had met with DEA Agent Mathews twice before the night of June 6 to discuss the suspicious activity on the Bazan property, that Garza had been a past police informant, that he had served as a deputy sheriff from 1981 to 1983, that he is a close personal friend of Deputy Sheriff Saenz, who knew of Garza's past trespasses on the ranch, and that DEA Agent Mathews "asked Garza to conduct surveillance on the ranch." We disagree with appellants both in their contention that the government knew of

and acquiesced in Garza's conduct, and in their contention that it is obvious that Garza acted solely to aid the government. These issues are considered in turn.

We already have held that a person's former employment as a police officer or former status as a police informant does not convert private action into state action for purposes of the Fourth Amendment. United States v. Bomengo, 580 F.2d 173, 175 (5th Cir. 1978). Obviously, close personal friendship with a deputy sheriff does not render one a government agent. The only portion of appellants' contentions here that has prima facie merit is that Agent Mathews met with Garza prior to June 6 and instructed him to "conduct surveillance on the ranch."

Our study of the record, however, convinces us that this "instruction" to Garza was far too vague and general to

constitute governmental knowledge of the search that is here challenged. Testimony at trial indicated that in May of 1985 Garza approached Agent Mathews to "tell him we needed to put a stop to certain individuals around my area," and that Mathews had responded "why don't you give me a call sometime." At the second meeting, in early June, Mathews asked Garza if he had seen any vehicles go into Bazan's ranch; Garza answered in the affirmative and stated that "they might be moving drugs." Mathews told Garza to call "if he saw something strange." Garza emphatically denied that Mathews told him about any police plans regarding the ranch. During cross-examination, he was asked repeatedly by all three attorneys whether he spoke to Agent Mathews or Deputy Saenz, or any other officer, before trespassing on June 6, and each time he denied that he had. The testimony of Saenz

and Mathews corroborates that neither knew that Garza was going to enter the ranch on June 6 until after it happened. Mathews testified that he told Garza to call him if he saw trucks entering the ranch "[a]nd then to get out of the area and I would be there." Mathews had no reason to predict that Garza would enter the ranch, and he clearly did not request that Garza do so. And, as Garza testified, when he heard the trucks cross the cattleguard he did not pause to tell anyone before rushing to follow it onto the ranch. We conclude that it cannot be said that the government "knew of" or "acquiesced in" the intrusive conduct.

As stated above, the Ninth Circuit's Miller opinion includes two factors in the "instrument or agent" analysis: (1) the government's knowledge of the intrusive conduct, and (2) "whether the party

performing the search intended to assist law enforcement efforts or to further his own ends." 688 F.2d at 657. In Miller itself, the party performing the intrusive search was the victim of a theft; with police knowledge, he entered the defendant's property to photograph his stolen trailer. The photographs were admitted into evidence at defendant Miller's trial. Although informant Szombathy had told officers he intended to enter Miller's property to search for his trailer, the court held this was a private search. The court reasoned that Szombathy acted to further his own ends. It notes that there was "nothing in the record to suggest that the officers encouraged Szombathy to act on their behalf, or even planted the idea of conducting a private search." Id.

Our review of the record in the instant case convinces us that there was

considerably less police involvement in Garza's search than there had been in the Miller search, which the court found to be private. The record makes clear that Garza was a neighbor of Bazan's who was quite concerned about the illegal activity nearby and that it was he who initiated contact with DEA Agent Mathews because of this concern. In Miller, the police knew in detail what the informant proposed to do and when he would do it; here Mathews had no knowledge of what Garza would do or when he would act. Furthermore, like the informant in Miller, Garza indeed may have had a personal motive to conduct the search—the Bazan ranch had once belonged to Mrs. Garza's family and the defense itself advanced the theory at trial that Garza's real motive for testifying against Bazan was his hope of regaining the property. In any event, we are not obliged to settle the

question what was Garza's "true" reason for entering the ranch, for an informant's personal motive to conduct a search is not at all inconsistent with an intention to aid a police investigation. Where, as here, the government has not offered the informant any form of compensation for his efforts, personal motives in fact are likely to be mixed with the desire to help the authorities. The same can be said of the informant in the Miller case. Although the court there suggests that Szombathy's motive was purely "personal," self-help repossession of his trailer was clearly not his goal. Rather, he desired to cooperate with the authorities to regain the trailer, and his motives for conducting the search were mixed.

In sum, we hold that where the government has offered no form of compensation to an informant, did not

initiate the idea that he would conduct a search, and lacked specific knowledge that the informant intended a search, the informant does not act as a government agent when he enters another's property.

Since we hold that Garza's search was private, not public, we do not reach the question whether it falls under the open fields doctrine of Oliver v. United States, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). But we do point out, since counsel overlooks it, that under the doctrine of Oliver the fact that an entry is a trespass by either statute or common law is in no way synonymous with its being an illegal search under the Fourth Amendment. The Court in Oliver makes clear that crossing a high, intact, fence and/or "no trespassing" sign does not make the entry a Fourth Amendment violation, regardless of whether it is a trespass.

II. Prosecutorial Misconduct

Appellant Bazan alleges that the prosecutor's behavior at his trial was so prejudicial that it warrants reversal of his convictions. We disagree.

Bazan first argues that his conviction should be reversed because of death threat evidence introduced by the prosecution. At trial the prosecutor asked witness Garza whether he felt in any way pressured or threatened, and the judge sustained defense counsel's immediate objection to the question before the witness answered. The court then instructed the jury to completely and totally disregard the question. Bazan says in his brief that Garza shook his head affirmatively, but nothing was done at that time to make this a matter of record or to request the trial court to deal with it. In his closing argument the prosecutor stated: "It cost somebody a pretty penny. That

seizure cost someone a lot of money. And that's why [Garza's] identity was not made known until recently, until the time to come to court." Bazan maintains that the prosecutor's question and closing statement were designed to prejudice the jury against him and that the court's instruction to disregard cannot cure the taint.

In support of his position, Bazan cites United States v. Qamar, 671 F.2d 732 (2d Cir. 1982), and United States v. Gonzalez, 703 F.2d 1222 (11th Cir. 1983). Neither of these cases is relevant here, however. Both turn down a defense challenge to a trial court decision to admit death threat evidence, upholding trial court discretion to decide that such evidence is indeed admissible. In the case at bar, by contrast, there is no challenge made to the judge's pretrial ruling against the admission of death threat evidence. Rather,

the alleged "error" is the court's refusal to grant a mistrial on the ground that the prosecutor attempted to inject evidence which the court had previously ruled unsubstantiated.

Federal Rule of Criminal Procedure 52(a) states that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." We hold that the judge here made no error in refusing to grant a mistrial. The prosecutor's failure to follow the court's pretrial ruling clearly was a defect, but we conclude beyond a reasonable doubt that it did not affect substantial rights. There is no reason to believe that the jury failed to follow the judge's curative instruction.

Bazan argues that the defect must have been harmful because it bolstered the credibility of the informant, and "the sole

evidence against the Defendant was the Informant's testimony and [the also inadmissible] extraneous offenses." Nothing could be farther from the truth. Eighteen other witnesses testified at trial, including numerous law enforcement officers. Samples of the cocaine and marijuana found on the truck were introduced into evidence, as were other items of circumstantial evidence.

Bazan next argues that his convictior should be reversed because the prosecutor introduced evidence of extraneous offenses contrary to the court's pretrial instructions. In response to a pretrial motion, the judge ruled that the government could introduce evidence of an October 1982 conviction for possession of cocaine and a December 1984 charge for possession of cocaine and marijuana. Bazan here complains that in eliciting evidence of the 1982

conviction, the testifying agent had to rely in part on hearsay, and the court sustained defense counsel's objection. The prosecutor then stated: "[a]pparently they have sent us the wrong agent." Bazan maintains that this was improper prosecutorial endorsement of inadmissible hearsay evidence. He also complains because testimony revealed that the 1982 conviction actually was for marijuana, not cocaine, and because a prosecutorial question intimated other drug charges.

In United States v. Lichenstein, 610 F.2d 1272, 1281-82 (5th Cir. 1980), we held that "prejudicial comment, such as the references here to possible extrinsic effects or violations, may be rendered harmless by curative instructions to the jury." Such instructions were also given to the jury in the instant case, and the

prosecutorial comments here were not as prejudicial as those in Lichenstein.

Bazan's next argument for reversal is that midtrial the government dismissed two codefendants in the case in the presence of the jury. He cites no cases for the proposition that this affected his substantial rights. In United States v. Martinez, 604 F.2d 361 (5th Cir. 1979), we affirmed a defendant's conviction even though his brother was arrested during his trial, in the presence of the jury, and by two officers who were important witnesses at defendant's trial.

Although Bazan's three charges of prosecutorial misconduct here have been addressed separately, even viewing them cumulatively, we find no error in denying Bazan's motions for a mistrial. In the context of a seven-day trial which produced a transcript of over 1900 pages, we find

that the defects here complained of were harmless beyond a reasonable doubt.

III. Double Jeopardy

Graciela Flores was convicted for conspiracy to possess with intent to distribute over one kilogram of cocaine, and for conspiracy to possess with intent to distribute over fifty kilograms of marijuana. She argues that her conviction and sentence on two separate conspiracy counts based on a single agreement violates the double jeopardy clause of the Fifth Amendment. We agree.

In United States v. Winship, 724 F.2d 1116 (5th Cir. 1984), the defendant's two conspiracy convictions both came under the same statute, 21 U.S.C. § 846. One count pertained to marijuana and the other, for an overlapping but not identical time period, pertained to methamphetamine. As we there noted, "[f]or each conspiracy conviction the

government seeks, it must prove a corresponding, separate agreement." Winship, 724 F.2d at 1126. We then set forth

> five focal points for determining whether evidence in a conspiracy trial proves more than one offense: (1) the time-frames of the charged conspiracies; (2) the persons acting as conspirators; (3) the statutory offenses charged in the indictment; (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case; and (5) the places where the events alleged as part of the conspiracy took place.

Id.

The facts in the instant cases meet the five Winship factors for the singularity of an offense at least as well as the facts of Winship itself. In Winship, "[t]he marijuana conspiracy occurred wholly within the period of the methamphetamine conspiracy." Id. In the instant case the

marijuana and cocaine conspiracies occurred within exactly the same time, namely, "on or about June 6, 1985." In Winship, "a core cast of characters was the same in both conspiracies." Id. at 1127. In the instant case, exactly the same characters were in both conspiracies. In Winship, as here, "both indictments charged violations of Section 846." Id. Because "no overt act need be alleged in a Section 846 indictment," the fourth factor "is not telling either way" in either Winship or the instant case. Id. "In terms of the location element, though, significant parallels exist between the two conspiracies," id., whereas in the instant case the location is identical.

We conclude that the double jeopardy clause of the Fifth Amendment bars conviction of Flores for two conspiracies,

since under the Winship test only one conspiracy was proved.

Flores next argues that only one substantive controlled substance offense occurred, and hence that the double jeopardy clause also was violated when she was convicted of both aiding and abetting and possession with intent to distribute over one kilogram of cocaine, and of aiding and abetting and possession with intent to distribute over fifty kilograms of marijuana. Flores cites Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), but, in fact, this case does not support her position. The Court there states that "[t]he applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision

requires proof of an additional fact which the other does not." Id. at 304, 52 S.Ct. at 182. Here, count 2 charges a violation of § 841(b)(1)(A) ("a controlled substance ... which is a narcotic"), while count 4 charges a violation of § 841(b)(1)(B) ("a controlled substance ... which is not a narcotic"). Different penalties attach to each. Further, the government obviously must prove an additional fact for the marijuana conviction as opposed to the cocaine conviction. Flores' second double jeopardy argument is without merit.

IV. An Illegal Arrest?

After receiving Garza's call on the morning of June 6, authorities entered the Bazan ranch and arrested both Bazan and Flores. Two pistols, a small amount of marijuana, and lidocaine (a substance used to "cut" cocaine) were seized from Flores' purse and cloth make-up bag. She argues

here that these items should have been suppressed because they were obtained pursuant to an illegal arrest. We disagree.

Flores maintains that she is "in the same position as the appellant in Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979)." In that case, Ybarra was a patron of the Aurora Tap Tavern, and the police had a warrant to search the tavern as well as its bartender. The Court held that this warrant was an insufficient basis on which to search Ybarra, who was merely present in the tavern. The Court explained that "[t]here is no reason to suppose that, when the search warrant was issued . . . the authorities had probable cause to believe that any person found on the premises of the Aurora Tap Tavern, aside from [the bartender], would be violating the law." Id. at 90, 100 S.Ct. at 341-42. In the instant case, by contrast, there was

good reason to suppose that any person found on the Bazan ranch immediately after Garza's telephone call to Mathews would be violating the law. Unlike the Aurora Tap Tavern, the Bazan ranch is not open to members of the general public; it is both private and fenced. Moreover, Flores was a passenger in the pickup truck Bazan was driving when he cut his fence in an effort to escape. The arrest of Flores was based on probable cause and there was no reason to suppress the items found in her purse.

The other points of error raised by appellants are meritless. Flores' conviction for two conspiracies is reversed, and the case is remanded with instructions to enter judgment of conviction for only one conspiracy and for resentencing of Flores accordingly. In all other respects the judgment of the district court is affirmed.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

United States of America vs.	United States District Court for THE SOUTHERN DISTRICT OF TEXAS
JESUS BAZAN, JR. DEFENDANT	BROWNSVILLE DIVISION DOCKET NO. B-85-366-01

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date October 25, 1985

COUNSEL

X WITH COUNSEL Heriberto Medrano

PLEA

X NOT GUILTY on July 11, 1985

FINDING & JUDGMENT

There being a verdict of
X GUILTY. September 24, 1985

Defendant has been convicted as charged of the offense(s) of conspiracy to possess, with intent to distribute, over one kilogram of cocaine, in violation of Sections 846, 841(a)(1), and 841(b)(1)(A), Title 21, United States Code, on Count 1; Possession with intent to distribute over one kilogram of cocaine, namely 846 pounds of cocaine, in violation of Sections 841(a)(1) and 841(b)(1)(A), Title 21, and Section 2, Title 18, United Sates Code, on Count 2; Conspiracy to possess, with intent to distribute, over 50 kilograms of marihuana, in violation of Sections 846, 841(a)(1),

841(b)(1)(B), Title 21, United States Code, on Count 3; Possession with intent to distribute over 50 kilograms of marihuana, approximately 125 pounds, in violation of Section 841(a)(1), and 841(b)(1)(B), Title 21, and Section 2, Title 18, United States Code, on Count 4 of the indictment. OFFENSE WAS COMMITTED ON JUNE 6, 1985

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of twenty (20) years as to Count 1; twenty (20) years as to Count 2; ten (10) years as to Count 3; Counts 1, 2, and 3, to run consecutively for a total of fifty (50) years; fifteen (15) and twenty-five (25) years Special Parole Term as to Count 4, to run concurrently to Counts 1, 2, and 3.

The Court further orders forfeiture of property described in the Indictment.

The Court further imposes a $50 special monetary assessment as to

each of Counts 1, 2, 3, and 4, for a total of $200, pursuant to 18 USC 3013.

The court orders commitment to the custody of the Attorney General and recommends,

APPROVED AS TO FORM:

/S/_____
U.S. Probation Officer

SIGNED BY
X U S District Judge /S/ Filemon B. Vela

United States of America vs.	United States District Court for THE SOUTHERN DISTRICT OF TEXAS
MANUEL ALEMAN	BROWNSVILLE DIVISION
DEFENDANT	DOCKET NO. B-85-366-02

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date October 25, 1985

COUNSEL

X WITH COUNSEL Reynaldo S. Cantu

PLEA

X NOT GUILTY on July 11, 1985

FINDING & JUDGMENT There being a verdict of X GUILTY. on September 24, 1985

Defendant has been convicted as charged of the offense(s) of conspiracy to possess, with intent to distribute, over one kilogram of cocaine, in violation of Sections 846, 841(a)(1), and 841(b)(1)(A), Title 21, United States Code, on Count 1; Possession with intent to distribute over one kilogram of cocaine, namely 846 pounds of cocaine, in violation of Sections 841(a)(1) and 841(b)(1)(A), Title 21, and Section 2, Title 18, United States Code, on Count 2; Conspiracy to possess, with intent to distribute, over 50 kilograms of marihuana, in violation of Sections 846, 841(a)(1),

841(b)(1)(B), Title 21, United States Code, on Count 3; Possession with intent to disbritube over 50 kilograms of marihuana, approximately 125 pounds, in violation of Section 841(a)(1), and 841(b)(1)(B), Title 21, and Section 2, Title 18, United States Code, on Count 4 of the Indictment.

OFFENSE WAS COMMITTED ON JUNE 6, 1985

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) years as to Count 1; fifteen (15) years as to Count 2; fifteen (15) years as to Count 3; fifteen (15) years and a ten (10) year Special Parole Term as to Count 4; Counts 1, 2, 3, and 4, to run concurrently.

The Court further imposes a $50 special monetary assessment as to each of Counts 1, 2, 3, and 4, for a total of $200, pursuant to 18 USC 3013.

The court orders commitment to the custody of the Attorney General and recommends,

APPROVED AS TO FORM:

/S/_____
U.S. Probation Officer

SIGNED BY
X U S District Judge /S/ Filemon B. Vela

United States of America vs.	United States District Court for THE SOUTHERN DISTRICT OF TEXAS
GRACIELA FLORES	BROWNSVILLE DIVISION
DEFENDANT	DOCKET NO. B-85-366-03

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date October 25, 1985

COUNSEL

X WITH COUNSEL Robert J. Flores

PLEA

X NOT GUILTY on July 11, 1985

FINDING & JUDGMENT There being a verdict of X GUILTY. on September 24, 1985

Defendant has been convicted as charged of the offense(s) of conspiracy to possess, with intent to distribute, over one kilogram of cocaine, in violation of Sections 846, 841(a)(1), and 841(b)(1)(A), Title 21, United States Code, on Count 1; Possession with intent to distribute over one kilogram of cocaine, namely 846 pounds of cocaine, in violation of Sections 841(a)(1) and 841(b)(1)(A), Title 21, and Section 2,Title 18, United States Code, on Count 2; Conspiracy to possess, with intent to distribute, over 50 kilograms of marihuana, in violation of

Sections 846, 841(a)(1), 841(b)(1)(B), Title 21, United States Code, on Count 3; Possession with intent to distribute over 50 kilograms of marihuana, approximately 125 pounds, in violation of Section 841(a)(1), and 841(b)(1)(B), Title 21, and Section 2, Title 18, United States Code, on Count 4 of the Indictment.

OFFENSE WAS COMMITTED ON JUNE 6, 1985.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of seven (7) years as to Count 1; seven (7) years as to Count 2; seven (7) years as to Count 3; seven (7) years and five (5) years Special Parole Term as to Count 4; Counts 1, 2, 3 and 4, to run concurrently, pursuant to 18 USC 4205(b)(2), which will allow parole at such time as the Parole Commission may determine is appropriate.

The Court further imposes a $50 special monetary assessment as to

each of Counts 1, 2, 3, and 4, for a total of $200, pursuant to 18 USC 3013.

The court orders commitment to the custody of the Attorney General and recommends,

APPROVED AS TO FORM:

/S/_____
U.S. Probation Officer

SIGNED BY
X U S District Judge /S/ Filemon B. Vela

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	*	
VS	*	CRIMINAL NO. B-85-366
JESUS BAZAN, JR. MANUEL ALEMAN GRACIELA FLORES RALPH ALANIZ ROMAN BAZAN	*	

INDICTMENT

THE GRAND JURY CHARGES:

COUNT 1

That on or about June 6, 1985, within the Southern District of Texas, and elsewhere, JESUS BAZAN, JR., MANUEL ALEMAN, GRACIELA FLORES, RALPH ALANIZ and ROMAN BAZAN knowingly and intentionally did combine, conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute over one kilogram of cocaine, a controlled substance under Schedule II of

the Controlled Substances Act of 1970, in violation of Sections 846, 841(a)(1) and 841 (b)(1)(A), Title 21, United States Code.

*****

COUNT 2

That on or about June 6, 1985, within the Southern District of Texas, and within the jurisdiction of this Court, JESUS BAZAN, JR., MANUEL ALEMAN, GRACIELA FLORES, RALPH ALANIZ and ROMAN BAZAN did knowingly and intentionally possess, with intent to distribute, over one kilogram of cocaine, namely approximately 846 pounds gross weight of cocaine, a controlled substance under Schecule (sic) II of the Controlled Substances Act of 1970, contrary to Sections 841(a)(1), and 841(b)(1)(A) Title 21, and Section 2, Title 18, United States Code.

*****

COUNT 3

That on or about June 6, 1985, within the Southern District of Texas, and elsewhere, JESUS BAZAN, JR., MANUEL ALEMAN, GRACIELA FLORES, RALPH ALANIZ, and ROMAN BAZAN knowingly and intentionally did combine, conspire, confederate, and agree together and with each other and with other persons unknown to the Grand Jurors to unlawfully possess, with intent to distribute over 50 kilograms of marihuana, a controlled substance under Schedule I of the Controlled Substances Act of 1970, in violation of Sections 846, 841(a)(1) and 841(b)(1)(B), Title 21, United States Code.

*****

COUNT 4

That on or about June 6, 1985, within the Southern District of Texas, and within the jurisdiction of this Court, JESUS BAZAN, JR., MANUEL ALEMAN, GRACIELA FLORES, RALPH

ALANIZ, and ROMAN BAZAN did knowingly and intentionally possess, with intent to distribute over 50 kilograms of marijuana, namely approximately 125 pounds gross weight of marihuana, a controlled substance under Schedule I of the Controlled Substances Act of 1970, contrary to Sections 841(a)(1), 841(b)(1)(B), Title 21, and Section 2, Title 18, United States Code.

*****

A TRUE BILL:

/s/ JOHN HAMPTON
FOREMAN OF THE GRAND JURY

HENRY K. ONCKEN
UNITED STATES ATTORNEY

BY: ROBERT L. GUERRA
Assistant United States Attorney

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	§	
	§	
VS.	§	CRIMINAL NO. B-85-366
	§	
JESUS BAZAN, JR.	§	
MANUEL ALEMAN	§	
GRACIELA FLORES	§	
RALPH ALANIZ	§	
ROMAN BAZAN	§	

MEMORANDUM AND ORDER AS TO
DEFENDANTS' MOTION TO SUPPRESS

On September 3, 1985, came to be heard the Defendants' Motions to Suppress. Defendant Jesus Bazan, Jr. moved to suppress any and all evidence seized from his ranch in Starr County, Texas, as well as any testimony of any witnesses which was obtained through illegal means. In support of his contention, Mr. Bazan alleges that the evidence and testimony of a "government

informant" should be suppressed based on the fact that the "informant" trespassed onto his land on the morning of June 6, 1985. Mr. Bazan further alleges that the entry was initiated for the purpose of making observations which served as the basis for the Government's search warrant affidavit. He argues that the "informant" acted as an agent of the Government. Defendant Jesus Bazan, Jr. lastly asserts that he was arrested illegally without a warrant and that the subsequent search of his premises was illegal.

Defendant Manuel Aleman has challenged the lawfulness of the stop and subsequent search of a truck he was driving by Border Patrol Agents.

Defendant Graciela Flores has challenged the propriety of her arrest and search. She further questions the lawfulness of the impoundment and subsequent

search of her automobile from the parking lot of the Fort Ringgold Motor Inn in Rio Grande City, Texas.

Defendants Ralph Alaniz and Roman Bazan both claim their arrest and search was unlawful. Mr. Alaniz further challenges the search of his automobile.

The evidence presented at the hearing caused the Court to make the following Findings of Fact and Conclusions of Law:

A. FINDINGS OF FACT REGARDING ENTRY OF CONCERNED CITIZEN ONTO BAZAN RANCH ON JUNE 6, 1985

(1) A concerned citizen entered the ranch of Jesus Bazan, Jr., at approximately 2:30 a.m., June 6, 1985, and observed the named Defendants in this action, loading packages onto a tractor/trailer. The citizen believed the packages contained narcotics.

(2) Prior to his entrance onto the property, the citizen had never intimated to law enforcement agents that he was considering such action. Law enforcements (sic) agents neither suggested nor advised the citizen to enter the property.

(3) The concerned citizen is a former law enforcement officer. He has "worked" with Customs Agent Billy Matthews since 1982. At the time of his observations, he was not employed by any law enforcement agency.

(4) The concerned citizen has not received, nor will he receive any financial remuneration for his participation in the case.

(5) Subsequent to the arrest of the Defendants, the concerned citizen identified each of them from a

photographic lineup prepared by law enforcement agents.

B. FINDINGS OF FACT RELATING TO SUBSEQUENT INVESTIGATION

(1) On May 4, 1985, United States Customs Agent Billy Matthews and Starr County Special Investigator Hilario Saenz, Jr. contacted a concerned citizen for the purpose of obtaining information in regard to an ongoing investigation. Agent Matthews told the individual that any information involving the smuggling of narcotics or other criminal activity would be appreciated.

(2) Agent Matthews testified that on or about May 11, 1985, the concerned citizen contacted Investigator Saenz and requested a meeting. At this meeting, the citizen stated that an organization under the direction of

Jesus Bazan, Jr. was using a ranch located 4.2 miles east of El Sauz, Texas as a narcotics distribution terminal.

(3) The ranch is owned by Jesus Bazan, Jr. and is located on the dirt and caliche road, known as "El Negro Ranch Road", which connects with FM 649. The area had been under investigation since April of 1982. The property is surrounded by a four/five strand barbed wire fence. The ranch encompasses 547 acres. It is located in close proximity to the Mexican Border in an area known to involve the smuggling of illegal aliens and narcotics.

(4) On or about May 13, 1985, Agent Matthews met once again with the concerned citizen. The individual told Agent Matthews that for the past several months, usually every two weeks

and during the night hours, pickup campers and a Chevrolet Suburban would deliver what the citizen believed to be narcotics into the Bazan ranch. At one point the citizen told Matthews he had seen boxes in one of the vehicles. The citizen claimed that after the vehicles entered the ranch, several described truck/tractors with either tank trailers or flat trailers would enter the property and depart several hours later. The citizen told Matthews that after the trucks left the Bazan property, they would travel on "El Negro Road" towards El Sauz, and head north on FM 649 towards Hebbronville.

(5) The citizen described the most frequently used vehicles as (1) a large International Truck/Tractor colored red with a red flat trailer, and (2) a Mack Truck/Tractor colored white with a Bulk

Cement Trailer colored yellow. The citizen also stated other vehicles had been observed.

(6) At the time, Agent Matthews was aware that Jesus Bazan, Jr. had an extensive criminal history involving narcotics and traffic violations.

(7) On or about May 31, 1985, DEA Agent Mason, a DEA Pilot and Investigator Kenneth Heibert flew over the Bazan ranch and took aerial photographs. The agents did not identify any oil or gas wells on the property. Furthermore, no dairy cattle or dairy production facilities were located.

(8) On June 6, 1985 at approximately 5:25 a.m., Agent Matthews received a phone call from the concerned citizen who advised that a White truck/tractor pulling a tank trailer had entered the Bazan ranch at 2:30 a.m. and had

departed at 5:10 a.m. traveling north on FM 649 towards Hebbronville. The citizen described the vehicle as "loaded". Shortly thereafter, Agent Matthews notified Sector Communications and placed a lookout with the U.S. Border Patrol and Jim Hogg County Sheriff's office. He also notified DEA Agent Mason and Investigator Saenz.

(9) Testimony adduced at this hearing revealed that no permanent border patrol checkpoint is located on FM 649. Furthermore, FM 649 is a road well known to law enforcement agents because of its heavy use in the transporting of illegal aliens and the trafficking of narcotics from Mexico to northern destinations. FM 649 deadends into Highway 16. Neither of these roads are major routes leading north.

(10) At approximately 6:20 a.m., Border Patrol agents stopped a truck which matched the description given by the concerned citizen, as it entered Hebbronville on Highway 16. Border Patrol Agent Putnam had followed the truck/tanker for approximately one mile. He identified the vehicle as one of a type frequently used in transporting illegal aliens and narcotics. He testified at this hearing that it was unusual for such a vehicle to be on Highway 16 at such an early hour. Furthermore, he observed no I.C.C. markings on the driver's door and the absence of a "flammable warning" label.

(11) After stopping the vehicle, Agent Putnam approached the driver and met him halfway the distance of the tanker. Agent Putnam detected the smell of

marijuana emanating from the center valve. He proceeded to open the center hatch and observed marijuana debris. The driver of the truck, Manuel Aleman, was placed under arrest. The vehicle and the tanker were removed to Border Patrol headquarters in Hebbronville.

(12) Agent Matthews phoned Investigator Saenz, at approximately 6:30 a.m., requesting his assistance in protecting the ranch gates at the Bazan property and in identifying people leaving the premises. Matthews subsequently notified Agents McCormick and Garcia, instructing them similarly and advising them to protect any truck tire tracks.

(13) At approximately 6:50 p.m. (sic), Agent Hammond calling from the Hebbronville Border Patrol office, notified Matthews that the vehicle was loaded. An agent in Hebbronville had disconnected a pipe

attached to the belly of the tanker and had observed numerous boxes. The vehicle and tanker were taken to DEA headquarters in McAllen, where a full search of its contents revealed a large quantity of marijuana and cocaine.

(14) At approximately 7:15 a.m., Agent McCormick advised Matthews that Jesus Bazan, Jr. and a female identified as his wife, were at the main gate of the ranch. Agent McCormick notified Bazan that he was present to identify individuals leaving the ranch and to protect tire tracks. Bazan proceeded back into his ranch. He locked the main gate, and drove up and down the fenceline in what the agents perceived as an attempt to destroy visible tire tracks.

(15) At approximately 7:35 a.m., Agent Garcia advised Matthews that Bazan was

near a second entrance to the property identified as gate number 2. At approximately 7:36 a.m., DEA Agent Mason advised the agents to take Bazan into custody, a warrant was being prepared.

(16) At approximately 7:45 a.m., Garcia advised that Bazan was cutting the fence surrounding his property, halfway between the gates. At around 7:47 a.m., Investigator Saenz pulled up to the cut in the fence as Bazan was exiting the premises. Mr. Saenz advised Bazan that it would be best if he proceeded back to his ranch house.

(17) Agent Matthews accompanied by Agent Heibert, arrived outside the Bazan ranch at approximately 8:00 a.m. Picking up Investigator Saenz, Matthews entered the ranch through the hole in the fence Bazan had severed. The

Agents followed Mr. Bazan's vehicle tracks and came upon a three room house. Bazan came out of the house and was asked if anyone else was inside. Miss Flores came out shortly thereafter. Agent Matthews again asked Bazan if anyone else was in the house. Bazan replied negatively. Matthews told Bazan that he wanted to look in the house for security reasons, but would not conduct a search. Bazan replied, "Go look." A brief security check was conducted in the house. No evidence was observed or gathered at that time.

(18) Agent Matthews placed Bazan under arrest and read him his constitutional rights in English at approximately 8:07 a.m. At around 8:10 a.m., Investigator Saenz read Bazan his Miranda warnings in Spanish.

(19) At approximately 8:20 a.m., the woman eventually identified as Graciela Flores, asked Matthews for her cigarettes and if she could go get them. When asked as to their location, she replied that they were in her purse. Accompanying her into the house, Matthews asked her if there were any weapons present. As she reached for the purse, Matthews advised her to wait, and once again inquired as to the presence of any weapons. She replied, "Only a little one." Matthews removed a .25 caliber pistol. As Matthews handed her some cigarettes and a package of matches, she reached for a cloth bag which was located next to her purse. When asked, she replied that the bag contained her makeup. Matthews told her he was going to keep the purse

and the bag in his car prior to the arrival of the DEA agents.

(20) Carrying the bag by its bottom, Matthews' fingers came upon something long and hard. Upon reaching his automobile, he opened the bag and discovered a .38 automatic pistol.

(21) Matthews moved his car to a secure spot so as to prevent people from overhearing any radio communications. Agent Heibert observed Miss Flores coming around by the car window where Matthews was sitting. He placed her under arrest at approximately 8:40 a.m.

(22) Responding to radio communications, Customs Agent Andreas Funk proceeded towards the Bazan ranch on "El Negro" road at approximately 8:45 a.m. At the time, he received no specific instructions. While going towards the ranch, he stopped a pickup truck which

had been driving east, away from the ranch. The driver and passenger, Ralph Alaniz and Roman Bazan, were taken into custody and driven by Funk onto the ranch. The pickup truck was subsequently driven onto the ranch by Agent Funk.

(23) Prior to the issuance of a search warrant, Officer Schwartz of the Starr County Sheriff's Office, made plastic casts of footprints and tire tracks which extended slightly into the ranch. He also aided Investigator Saenz and DEA Agent Harper in photographing the tracks. The tracks were clearly visible from outside the ranch.

(24) After having been contacted by Matthews, and after having received information regarding the stop of the tanker truck and the search of its contents, DEA Agent Mason proceeded to

his office in McAllen, for the purpose of drawing up a warrant. He utilized information he had received from Agent Matthews.

(25) At approximately 1:25 p.m., a search warrant was issued by Magistrate Susan Williams. A full search of the Bazan property was conducted shortly thereafter.

(26) Upon executing the warrant on Miss Flores, a DEA Agent discovered a room key to the Fort Ringgold Motor Inn, #214 and a set of car keys. At approximately 2:30 p.m. DEA Agents Mason and Clark proceeded to the motel and spoke with an employee who told them he believed Flores had checked out and that a maid had cleaned the room. The agents further discovered a Cadillac automobile was registered with the front desk. The Agents conducted a

search of the room. No evidence was found.

(27) A DEA agent arrived from McAllen with the keys to Miss Flores' automobile. Agent Clark drove the vehicle to DEA headquarters in McAllen, where he subsequently executed an inventory search of its contents.

CONCLUSIONS OF LAW

Evidence adduced at this suppression hearing presents this Court with a wide array of Fourth Amendment issues. Each significant intrusion upon an individual's privacy rights is arguably a search or seizure. The reasonableness of each search will be separately evaluated in light of the evidence which the Government seeks to admit at trial.

I. ENTRY OF INFORMANT ONTO RANCH OF JESUS BAZAN, JR. ON JUNE 6, 1985

Defendant Jesus Bazan, Jr. has challenged the confidential informant's entry onto his property on June 6, 1985, as an illegal search prohibited by the Fourth Amendment to the United States Constitution. In resolving the issue, this Court must reach a conclusion as to whether the concerned citizen acted as a private individual, or as an agent of the Government. The Fourth Amendment's prohibition against unreasonable searches is inapplicable "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." United States v. Jacobsen, ___ U.S. ___, 104 S.Ct. 1652, 1656 (1984) (quoting Walter v.

United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

The Ninth Circuit in United States v. Miller, 688 F.2d 652, 657 (9th Cir. 1982), set forth two relevant factors in considering whether an individual acts as a governmental agent or as a private person: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends. While the concerned citizen's motivations were ultimately geared towards aiding law enforcement officials, no evidence was presented at this hearing which would indicate the government knew of or acquiesced in his actions. Nothing was presented which would suggest that law enforcement officers encouraged the citizen, or even planted the idea of conducting a

private search in his mind. Agent Billy Matthews was not aware of his actions prior to his entry. Both he and Investigator Hilario Szenz, Jr. testified that the concerned citizen was not a law enforcement officer at the time of his entry onto the Bazan ranch. Furthermore, each agent testified that the citizen was not receiving nor had he received any financial remuneration or special consideration for passing on the information. Ultimately, it is the opinion of this Court that the individual who relayed the information acted in a private capacity. Thus his entry onto the Bazan property did not constitute a Fourth Amendment search.

Assuming, arguendo, the citizen could be characterized as a government agent, this Court would reach the same conclusion in labeling the entry as lawful. The United States Supreme Court in Oliver v. United

States, _____ U.S. _____., 104 S.Ct. 1735, 1743 (1984), held that "the government's intrusion upon an open field is not a 'search' in the constitutional sense because the intrusion is a trespass at common law." The Court concluded "that an individual may not legitimately demand privacy for activities conducted out of doors, in fields, except in the area immediately surrounding the home." Id. at 1741. The Court rejected the suggestion that steps taken to protect privacy (ie., no trespassing signs, fences, and the secluded nature of the land) established that expectation of privacy in an open field. Id.

More recently, the Fifth Circuit in United States v. Dunn, No. 81-1200, slip op. at 5829 (5th Cir. July 16, 1985), held that law enforcement officials did not violate the Fourth Amendment by crossing a perimeter

fence which encircled a 198 acre ranch and any cross fences as they approached a ranch house enclave. The Court found that the agents' continued progress toward a large barn was not proscribed by the Constitution so long as they remained in open fields, outside the curtilage. Id. at 5833. Testimony at this hearing revealed the total acreage of the Bazan property to be 547 acres. The ranch is surrounded by a 4-5 inch barbed wire fence. Testimony further revealed the citizen observed the activities on the ranch with field glasses. No evidence presented would indicate that the individual made his observations from the area immediately surrounding the ranch house. It is the opinion of this Court that had the citizen acted in the capacity of a government agent, he did not invade the curtilage surrounding the Bazan residence. Consequently, his entry onto the Bazan ranch

the morning of June 6 would come under the per se exception to the warrant requirement as applied to open fields.

II. BORDER PATROL STOP OF TRUCK DRIVEN BY MANUEL ALEMAN

At approximately 6:15 a.m., June 6, 1985, Border Patrol agents stopped a truck tanker vehicle driven by Manuel Aleman, north on Highway 16 as it entered Hebbronville, Texas. Defendant Aleman has challenged the stop as violative of his Fourth Amendment rights. The stop was not conducted at a permanent border checkpoint, but was conducted by a roving patrol. The Supreme Court in United States v. Brignoni-Ponce, 422 U.S. 873 (1975), enumerated several factors which may be considered in reviewing the propriety of such stops:

> Characteristics of the area in which the vehicle is encountered, including proximity to the border, usual traffic patterns, and history

> of illegal alien traffic; type and appearance of the vehicle, including whether it appears heavily loaded; behavior of the driver; and the number, appearance and the behavior of the passengers.

The Fifth Circuit in United States v. Miranda-Perez, 764 F2d. 285, 288 (5th Cir. 1985), intimated that these factors are "... well suited to cases in which the transportation of contraband or illegal aliens is suspected. . ." Stops by the Border Patrol may be justified under circumstances less than those constituting probable cause for an arrest or search. United States v. Cortez, 449 U.S. 411, 421 (1981). "[T]he question is whether, based upon the whole picture, they, as experienced Border Patrol officers, could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." Id. at 421-22. Evidence adduced at this hearing makes it abundantly clear that the

stop of the truck was based on at the very least, reasonable suspicion. The Court takes note of the fact that Highway 16 and FM 649 are well known to law enforcement agents because both routes are used frequently in the transporting of illegal aliens and narcotics. The Court also takes note of the fact that Hebbronville is located in relative close proximity to the Border with Mexico.

Agent John Putnam of the Border Patrol had been placed on lookout for a truck matching the description of the vehicle driven by Manuel Aleman. Putman testified that it was a rare occurrence to observe a truck pulling a fuel tanker on Highway 16 so early in the morning. Furthermore, upon spotting the vehicle, he noticed there was no writing on the driver's door, an apparent violation of federal interstate commerce laws. In addition, he noticed the absence

of a flammable liquid warning label. After following the vehicle for one mile, Agent Putnam pulled it over. He identified the vehicle as a type frequently used in the smuggling of illegal aliens and contraband.

Aside from any suspicion which may have arisen because of the physical characteristics of the vehicle, its proximity to the border on a road frequently used in narcotics traffic, and the time of day it was observed, the Border Patrol agents had been placed on lookout by Sector Communications for a vehicle matching the truck's description. The concerned citizen in this case, had telephoned Agent Matthews at 5:25 a.m. on June 6, 1985 and given him a description of the truck driven by Aleman. The citizen described the truck as being "loaded." The citizen was well known to Agent Matthews and had provided him with reliable information in the past.

It is the opinion of this Court that based upon the totality of the circumstances, the Border Patrol agents who stopped the vehicle driven by Manuel Aleman could have reasonably surmised it was engaged in criminal activity. The stop and subsequent search, therefore, were lawful.

III. SUBSEQUENT SEARCH OF TRUCK TANKER

After determining that the initial stop of the vehicle driven by Aleman was legal, the Court now turns its attention to the propriety of the subsequent search. Upon meeting the driver of the truck, Officer Putnam smelled marijuana emanating from the center of the tanker. He testified the aroma appeared to come from the center hatch. The Fifth Circuit has held that the smell of marijuana detected by a border patrol agent is sufficient alone to give an agent probable cause to conduct a full search of a vehicle. United States v.

Gordon, 722 F.2d 112 (5th Cir. 1983); United States v. Villarreal, 565 F.2d 932 (5th Cir. 1978) cert. denied 439 U.S. 824 (1978). Based upon this probable cause, Agent Putnam looked in the truck and observed marijuana seeds and debris.

Subsequently, Defendant Aleman was placed under arrest. The truck and tanker were removed to DEA headquarters in McAllen, Texas where a full search was conducted.

Based upon the evidence, it is the opinion of this Court that the search of the vehicle driven by Manuel Aleman was well founded upon probable cause.

IV. DETENTION OF JESUS BAZAN, JR. AND GRACIELA FLORES PRIOR TO ISSUANCE OF A WARRANT

Jesus Bazan, Jr. and Graciela Flores have challenged their arrest as unlawful and not premised upon probable cause. Upon reviewing the facts, the Court concludes that the first moment law enforcement agents

came into contact with Mr. Bazan and Ms. Flores was at approximately 7:15 a.m. on June 6, 1985.

A. INITIAL STOP

Agent Matthews testified he had directed Customs Agent McCormick at around 6:30 a.m., to proceed to the Bazan ranch and identify persons leaving the premises. He further instructed Agent McCormick to protect any truck tire tracks. Agent Matthews shortly thereafter called Customs Agent Tony Garcia and instructed him similarly.

Sometime after 7:00 a.m., Agent McCormick met Jesus Bazan, Jr. and a female at the main gate of the ranch. Agent McCormick told Mr. Bazan he was there to protect the tire tracks coming out of the ranch. When asked, Mr. Bazan identified the female accompanying him in his vehicle as his wife. Without inducement, Mr. Bazan

locked the gate to his ranch and told the officers that if they wished to enter, they would have to acquire a search warrant. Mr. Bazan was observed driving back and forth on his property along the fenceline in what the agents perceived as an attempt to destroy evidence of the tire tracks.

It is the opinion of this Court that the initial confrontation between Mr. Bazan, Ms. Flores and Agent McCormick at approximately 7:15 a.m., was justifiable as a brief stop for investigative purposes. "Brief stops in order to determine the identity of a suspicious individual or to maintain the status quo while obtaining more information are permitted if reasonable in light of the facts known to the officers at the time." United States v. Perate, 719 F.2d 706, 709 (4th Cir. 1983), citing Adams v. Williams, 407 U.S. 143-146; Terry v. Ohio, 392 U.S. 1, 20-22 (1968). To justify

the investigative stop of Bazan and Flores, Agent McCormick must have had sufficient information for a reasonable suspicion, not full probable cause necessary for an arrest. The Supreme Court in United States v. Cortez, 449 U.S. 411, 417 (1981), concluded that there must be "some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity . . ." The totality of the circumstances must be taken into account. Id. at 417-18.

Viewing the circumstances as a whole, the Court finds Agent McCormick had reasonable suspicion to stop Mr. Bazan and Ms. Flores. Testimony at this hearing revealed that the stop was executed strictly for identification purposes. Regarding reasonable suspicion, the concerned citizen had phoned Agent Matthews at approximately 5:25 a.m. and relayed a description of a truck/tanker vehicle which he had observed

leaving the Bazan property driving north on Highway 649. At the time of the phone call, the citizen was in pursuit of the vehicle and described it as "loaded". The vehicle was stopped by Agents and contraband was observed at 6:50 a.m. A tip from a well known informant coupled with subsequent corroboration of the tip's details can justify a reasonable suspicion of criminality. United States v. Kent, 691 F.2d 1376, 1380 (11th Cir. 1982), U.S. cert. denied in 462 U.S. 1119 (1983). It is the opinion of this Court, that the information relayed by the concerned citizen that a "loaded" truck had departed the Bazan property coupled with the subsequent discovery of narcotics on the vehicle, gave Officer McCormick reasonable suspicion to stop Bazan and Flores as they were leaving the premises.

B. DID THE INITIAL STOP BECOME AN ARREST?

The question naturally arises as to whether the initial interrogation of Bazan rose to the level of an arrest requiring probable cause.[1/] The Fifth Circuit developed a five-pronged test in answering this issue. United States v. Morin, 665 F.2d 765 (5th Cir. 1982).

(1) Whether probable cause to arrest has arisen,

(2) Whether the subjective intent of the officer conducting the interrogation was to hold the defendant,

(3) Whether the subjective belief of the defendant was that his freedom was significantly restricted,

(4) Whether the investigation had focused on the defendant at the time of the interrogation,

---

1/ Evidence at this hearing indicates that during the initial stop, Ms. Flores remained in a pickup while Agent McCormick questioned Bazan. She was not asked any questions. Therefore, any inquiry regarding her interrogation at that point in time is unnecessary

(5) Except in the context of border searches, whether an individual has been subject to successive stops.

Applying the first factor to the facts of the case, the Court does not believe the agents had probable cause to arrest either Mr. Bazan or Ms. Flores at 7:15 a.m. Utilizing the second prong, the Court is not of the opinion that the agents' intent was to hold Mr. Bazan or Ms. Flores. The Court concludes they were stopped solely for identification purposes. Regarding whether Bazan and Flores felt their freedom was restricted, it is uncontroverted Bazan reentered the ranch and locked the main gate by his own volition. Ms. Flores made no independent effort to protest or depart. Furthermore, Agent McCormick told Bazan that he was at the entrance of the property only

to secure evidence and identify individuals leaving the premises. Lastly, the Court concludes that at the time of the initial stop, the investigation had not focused on Bazan or Flores. The agents were not aware of who was on the premises.

After reviewing the facts in light of the factors set forth in Morin, the Court is of the opinion that the questioning of Bazan did not raise the investigatory stop to the level of an arrest.

C. SECOND STOP

After returning to his property, Bazan was observed driving around his ranch in what the agents perceived as an attempt to destroy evidence of visible tire tracks. Mr. Bazan, at the time of his initial contact with the agents, identified the female accompanying him as his wife. The agents had no reason to doubt his veracity. At 7:36 a.m. the agents were instructed to

arrest Bazan, a federal warrant was being prepared. Shortly afterwards, Bazan was observed cutting a hole through the barbed wire fence surrounding his ranch in an apparent attempt to flee. At 7:47 a.m., Chief Investigator Hilario Saenz, Jr. of the Starr County Sheriff's Office pulled in front of Bazan's, truck which was sticking partially out of the property, and advised him that it would be best if he would return to the ranch house.

A person is 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident a reasonable person would have believed he was not free to leave. United States v. Sanford, 658 F.2d 342, 344 (5th Cir. 1981), U.S. cert. denied 455 U.S. 991 (1982). The Court concludes that only at the point of the confrontation with

Investigator Saenz at 7:47 a.m. were Bazan and Flores technically under arrest.

The Court is next confronted with the issue as to whether there was probable cause to arrest Bazan and Flores. The Fifth Circuit noted that "although reasonable suspicion is insufficient to justify an arrest, additional facts that develop after a legal stop may create the probable cause necessary to effectuate an arrest." United States v. Costner, 646 F.2d 234, 236 (5th Cir. 1981). "Probable cause for an arrest exists when reasonably trustworthy facts and circumstances are within the knowledge of the arresting officer to warrant a reasonable belief that an offense has been or is being committed." Id. When minimal contact exists between the officers, the Courts have looked to their collective knowledge in determining whether probable cause exists. United States v. Agostino,

608 F.2d 1035, 1037 (5th Cir. 1979). "Probable cause must be judged not with the logic of cold steel, but with a common sense view to the realities of everyday life." Id. Utilizing this approach, the Court will review the evidence.

After his initial contact with Agent McCormick, Bazan reentered his property and locked the gate. He had identified Ms. Flores as his wife. He was observed driving his pickup, in which Ms. Flores was a passenger, up and down along the fence line. From the agent's perspective it appeared he was attempting to destroy evidence of any tire tracks. By this time, agents were aware that the truck, which the concerned citizen claimed had left the Bazan property earlier in the morning, had been stopped outside of Hebbronville. They were further aware that marijuana had been observed on the truck and the driver had been arrested.

Bazan was observed cutting a hole through his fenceline. When Investigator Saenz arrived, Bazan's truck was protruding out of the property. Investigator Saenz had every reason to believe Bazan was attempting to flee the premises. Furthermore, the agents were aware of Bazan's past criminal record. Based on the evidence, this Court concludes that the agent had probable cause to arrest Jesus Bazan, Jr. With regard to Graciela Flores, further analysis is required.

While mere association with a known or suspected criminal, or mere presence in that person's automobile does not create probable cause for arrest, it is this Court's opinion that the agents did indeed have cause to seize her. At the time Investigator Saenz instructed Bazan to return to his ranch house, Ms. Flores was known only as Mr. Bazan's wife. Not only was she present with Bazan in his vehicle, she was present with

him as he attempted to flee the premises. The agents could have reasonably concluded that as a witness to her (husband's) suspicious behavior, Ms. Flores was aware of the criminal nature of his actions. United States v. Clark, 754 F.2d 789, 791 (8th Cir. 1985).

An important consideration in weighing the significance of association with a person engaging in criminal activity, is whether the known criminal activity is contemporaneous with the association. United States v. Hillison, 733 F.2d 692, 697 (9th Cir. 1984). A second factor is whether the nature of the criminal activity is such that it could not normally be carried out without the knowledge of all persons present. Id. The Court takes note of the following facts. Border Patrol agents arrived at the entrance of the ranch at approximately 7:00 a.m., almost 1½ hours

after the concerned citizen had relayed information involving the departure of the truck from the Bazan property. No evidence presented at this hearing would indicate anyone entered after the agents arrived. The Court is apprised of the remote geographic location of the Bazan ranch, situated 4.2 miles east of El Sauz, Texas on El Negro Road. Mr. Bazan identified Ms. Flores as his wife. Furthermore, she was present with Bazan as he locked the gate to his own ranch from the inside, drove up and down the fence line destroying evidence, and drove through a cut he had made in his fence in an attempt to flee. Given the early morning hour on June 6, 1985, the Court concludes the agents could have reasonably drawn the conclusion that Ms. Flores had been on the ranch for some time. The agents could have concluded Ms. Flores' association with Mr. Bazan was contemporaneous with his

criminal activity. The concerned citizen's information concerning the "loaded" truck had proven true. The citizen had relayed information claiming the truck had entered the Bazan ranch at 2:30 a.m. and had departed at 5:10 a.m. It is the opinion of this Court that the agents had reasonably trustworthy facts and circumstances within their knowledge to warrant a reasonable belief that an offense had been or was being committed. As a result, the Court concludes the agents had probable cause to arrest Graciela Flores.

V. ENTRY ONTO BAZAN PROPERTY PRIOR TO WARRANT

Jesus Bazan, Jr. has challenged the entry of law enforcement officers onto his ranch, prior to issuance of a search warrant, as an illegal search. The Court will review the evidence.

Border Patrol agents arrived on the Bazan property at approximately 7:00 a.m. Upon his initial confrontation with Agent McCormick, Mr. Bazan was told that the agents were present to identify individuals leaving the ranch and to protect tire tracks. Mr. Bazan reentered his ranch and locked the gate. He was observed driving up and down along the fence in what officers perceived as an attempt to destroy evidence. At 7:36 the Agents were advised by Sector Communication to arrest Bazan. Shortly thereafter, Bazan was observed cutting a hole through his fence in an attempt to flee the premises. He was advised to return to his ranch house. At 8:02 a.m. Agents Matthews and Heibert accompanied by Investigator Saenz entered the ranch through the hole Bazan had cut and followed Bazan's vehicle tracks towards his house. When they arrived Bazan came out of the dwelling,

followed shortly thereafter by Ms. Flores. A brief security check was made of the house. Mr. Bazan was read his constitutional warnings in English at 8:10 a.m., and in Spanish at 8:15 a.m. A search warrant was issued at 1:30 p.m. Prior to this time, law enforcement agents photographed and made plaster casts of truck tire tracks and a tennis shoe track at the main gate of the property. No general search for evidence was conducted on the premises.

Chief Justice Burger and Justice O'Connor concluded in Segura v. United States, ____ U.S. ___, 104 S.Ct. 3380, 3389 (1984), "that securing a dwelling on the basis of probable cause, to prevent the destruction or removal of evidence while a search warrant is being sought is not itself an unreasonable seizure of either the dwelling or its contents." In a similar

vein, the 5th Circuit has held that a fear of the destruction of evidence is an exigent circumstance that may justify a warrantless entry onto a private home. United States v. Webster, 750 F.2d 307, 326 (5th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 2340 (1985). "To prevail on this exception (to the warrant requirement) the government must demonstrate that the agents had reason to believe that evidence was in danger of imminent destruction." Id. (quoting United States v. Thompson, 700 F.2d 944, 947-48 (5th Cir. 1983), aff'd 720 F.2d 385 (1983)).

Important factors which the Fifth Circuit has deemed relevant to the degree of exigency surrounding the fear of destruction of evidence include; (1) the agent's subjective belief; (2) information indicating that the suspects are aware that police are on their trail; and (3) the knowledge that efforts to dispose of

narcotics and to escape are characteristic behavior of persons engaged in narcotics trafficking. Id. The Court is of the opinion that the agents entered the property in order to secure the premises and to prevent the destruction of evidence. The agents, prior to their entry, had observed Bazan attempting to destroy the tire tracks. Furthermore, Bazan was aware of their presence and had attempted to flee the premises. The agents also had reason to believe that the truck which had been seized in Hebbronville had departed the Bazan ranch earlier in the morning. Fearing the destruction of vital evidence, the Court concludes the agents entered the property lawfully. No general search was conducted on the premises prior to the execution of a search warrant.

The Court finds that the entry of law enforcement agents onto the entrance of the

Bazan ranch to photograph and cast tire and tennis shoe imprints was also lawful. Agents had initially entered the ranch to protect the tracks from destruction. The Court must consider whether the casting and photographing of the tire tracks constituted an illegal search and seizure.

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." Jacobsen, ____ U.S. ____, 104 S.Ct. 1652, 1656. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in the property." Id. "[T]he Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967). This Court is of the opinion that any expectation of privacy Mr. Bazan may have had in the tire tracks and tennis shoe track located just inside of his gate, is not of

the type society considers reasonable. Assuming, arguendo, such a privacy interest exists, the Court would find it difficult to conclude that a "seizure" occurred. The Court is well aware of the fact that the casting of tire and shoe tracks is an essential function of law enforcement agencies. Under the facts of this case, the Court does not believe the exercise of this function involved a meaningful interference with Mr. Bazan's possessory interest in his property.

VI. SEARCH OF GRACIELA FLORES' PURSE AND CLOTH BAG

Graciela Flores has challenged the search of her purse and cloth bag as unlawful. Evidence adduced at this hearing indicates Ms. Flores was not concurrently placed under arrest with Jesus Bazan, Jr. At approximately 8:20 a.m., Ms. Flores asked Agent Matthews if she could go get some

cigarettes inside the ranch house. When asked as to their location, she replied that they were in her purse. Accompanying her inside, he inquired as to the presence of any weapons. As she reached for the purse, he repeated his inquiry. As Matthews obtained the purse and opened it, Flores replied, "Only a little one." A .25 caliber handgun was removed.

When asked as to the content of a cloth bag located next to the purse, Flores replied, "Makeup". Matthews handed Flores a package of cigarettes and a book of matches. As she reached for both the purse and the makeup bag, Matthews stopped her and advised her they would be in his custody prior to the arrival of DEA agents. As he carried the items towards his car, Matthews' fingers felt something long and hard through the cloth bag he was holding. Upon arriving at his car, he conducted a limited weapon check

of the bag and discovered a .38 caliber handgun. Ms. Flores was placed under arrest twenty minutes later at approximately 8:40 a.m., after she was observed coming up around Matthews' car which had been parked in a secure area.

The Court has already concluded that both Jesus Bazan, Jr. and Ms. Flores were under arrest when Investigator Saenz advised them to return to the ranch house at approximately 7:47 a.m. The propriety of a "search" is unaffected by the fact that it immediately precedes rather than follows a formal arrest. United States v. Burnett, 526 F.2d 911, 913 (5th Cir. 1976), cert. denied 425 U.S. 977 (1976). "There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger." Washington v. Chrisman, 455 U.S. 1, 7 (1982). The Supreme Court has held:

> "[I]t is not 'unreasonable' under the Fourth Amendment for a police officer, as a matter of routine, to monitor the movements of an arrested person, as his judgment dictates, following the arrest. The officer's need to ensure his own safety - as well as the integrity of the arrest - is compelling. Such surveillance is not an impermissible invasion of the privacy or personal liberty of an individual who has been arrested." Id.

Furthermore, incident to an arrest, a warrantless search is permissible for the arrestee's person and the area within his immediate reach. United States v. Cueto, 611 F.2d 1056, 1062 (5th Cir. 1980). "A lady's handbag is the most likely place for a woman similarly to conceal a weapon." United States v. Vigo, 487 F.2d 295, 298 (2d Cir. 1973). The Court concludes that the search of Ms. Flores' purse and cloth bag was lawful.

VII. SEARCH AND SEIZURE OF GRACIELA FLORES' AUTO

Graciela Flores has challenged the lawfulness of the seizure of her automobile from the parking lot of the Fort Ringgold Motor Inn, as well as the subsequent search of its contents. Upon executing the duly issued search warrant at the Bazan ranch, agents discovered a room key to the Fort Ringgold Motor Inn #214 on Graciela Flores. A set of keys was also found. DEA Agents Clark and Mason arrived at Rio Grande City between 2:30 and 3:00 p.m. and proceeded to the motel. The Agents spoke with an employee and discovered that a Cadillac automobile had been registered with the room Ms. Flores had occupied. The employee told the agents he believed the occupants of #214 had checked out and that a maid had cleaned the unit. The agents searched the room. No evidence was found. At approximately 3:00

p.m. an agent arrived at the hotel with the keys to Ms. Flores' vehicle. Special Agent Clark drove the auto to DEA headquarters in McAllen where he performed an inventory search.

One recognized exception to the Fourth Amendment's warrant requirement arises when the police acquire temporary custody of an automobile in the exercise of their "community caretaking functions." United States v. Staller, 616 F.2d 1284, 1289 (5th Cir. 1980), (quoting Cady v. Dombrowski, 413 U.S. 433, 441 (1973)). "In these circumstances, the Supreme Court has held that a warrantless inventory search of the automobile made 'pursuant to standard police procedures' and for the purpose of 'securing or protecting the car and its contents' is a reasonable police intrusion which does not offend Fourth Amendment principles."

Staller, Id., (quoting South Dakota v. Opperman, 428 U.S. 364, 372 & 373 (1976)).

The Fifth Circuit has noted that the mere fact that a vehicle is parked legally, does not of itself nullify the need to take the auto into protective custody. Staller, Id. In United States v. Staller, the Court found no Fourth Amendment violation where officers inventoried an automobile in a shopping center parking lot prior to its removal by a private wrecker. Id. at 1290. "Although the vehicle was lawfully parked and presented no apparent hazard to public safety, the officers were aware that a car parked overnight in a mall parking lot runs an appreciable risk of vandalism or theft." Id., (footnote omitted). The Fifth Circuit faced a similar fact situation in United States v. Ducker, 491 F.2d 1190 (5th Cir. 1974), where an individual was arrested in a shopping center. In accordance with the

sheriff's office regulations, the arresting officer conducted an inventory search of the individual's car in the shopping center parking lot. A second inventory search was conducted by customs officials as they took possession of the auto the following day. The Court upheld both searches as valid.

The Court takes note of the fact that Ms. Flores' car may not have been legally parked in the motel parking lot. It was brought to the agent's attention that Ms. Flores had apparently checked out of the motel. The Court could conceivably find that the vehicle was illegally parked. Without having to reach this conclusion, the Court nonetheless holds that the DEA agents acted lawfully in seizing Ms. Flores' vehicle and subsequently searching it pursuant to its inventory procedure. The agents could have reasonably assumed Ms. Flores would be away from her vehicle for a

prolonged period of time. It is the opinion of the Court that the agents acted wisely and in accord with their community caretaking function.

VIII. DETENTION OF ROMAN BAZAN AND RALPH ALANIZ

During this hearing, the Court invited the Government to favor it with authority which would rationalize the detention of Defendants Ralph Alaniz and Roman Bazan. The Government opted to avoid presenting any case authority to that effect. As a consequence, the Court concludes that the detention and subsequent search of Roman Bazan and Ralph Alaniz was unlawful.

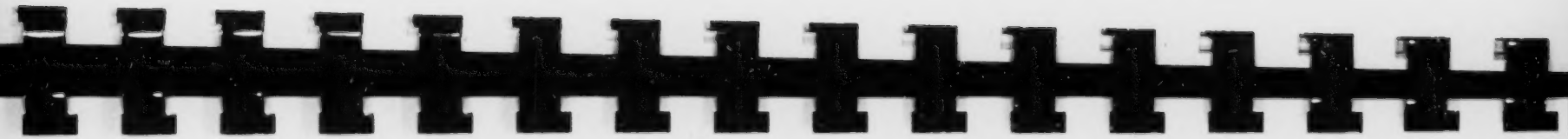
IX. CONCLUSION AND ORDER

In light of the enumerated Conclusions of Law, the Court hereby DENIES the suppression Motions as to Defendants Jesus Bazan, Jr., Manuel Aleman, and Graciela Flores. As to Ralph Alaniz and Roman Bazan,

the Court GRANTS their Motion and ORDERS any evidence gathered as a result of their seizure and subsequent search hereby suppressed.

DONE at Brownsville, Texas this 11th day of October, 1985.

/s/ Filemon B. Vela
FILEMON B. VELA
United States District Judge



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	*	
VS.	*	CRIMINAL NO. B-85-366
JESUS BAZAN, JR., MANUEL ALEMAN, and GRACIELA FLORES	*	

O R D E R

The Court has reviewed the Magistrate's Report and Recommendation which is hereby adopted.

It is therefore ORDERED, ADJUDGED and DECREED that Defendants', MANUEL ALEMAN and GRACIELA FLORES, Motions for Leave to Proceed in Forma Pauperis are hereby granted.

The Clerk shall send copies of this Order to counsel for the parties.

DONE at Brownsville, Texas, this 13th day of March, 1986.

/s/ Fileman B. Vela
FILEMAN B. VELA
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	*	
VS.	*	CRIMINAL NO. B-85-366
JESUS BAZAN, JR., MANUEL ALEMAN, and GRACIELA FLORES	*	

O R D E R

The Court has reviewed the Magistrate's Report and Recommendation which is hereby adopted.

It is therefore ORDERED, ADJUDGED, and DECREED that Defendant JESUS BAZAN, JR'S Motion for Leave of Court to Proceed on Appeal in Forma Pauperis be and is hereby DENIED; and

Defendants MANUEL ALEMAN'S and GRACIELA FLORES' transcripts be provided by the government.

The Clerk shall send copies of this Order to counsel for the parties.

DONE at Brownsville, Texas, this 6th day of MARCH 1986.

/s/ Filemon B. Vela
FILEMON B. VELA
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	*	
VS.	*	CRIMINAL NO. B-85-366
JESUS BAZAN, JR., MANUEL ALEMAN, and GRACIELA FLORES	*	

MAGISTRATE'S REPORT AND RECOMMENDATION

On December 19, 1985, a hearing was held before this Court concerning Defendants' motions for leave of court to proceed on appeal in forma pauperis, pursuant to deferral from the Honorable Filemon B. Vela, United States District Judge. Appearing for the United States of America was Mr. Jack Wolfe, on behalf of Defendant JESUS BAZAN, JR., was Mr. Heriberto Medrano, on behalf of Defendant MANUEL ALEMAN was Mr. Reynoldo S. Cantu, Jr., and on behalf of Defendant GRACIELA FLORES was Mr. J. Roberto Flores. After due consideration of these motions, together

with the supporting affidavits and argument of counsel, the Court made the following rulings.

As to Defendants GRACIELA FLORES' and MANUEL ALEMAN'S motions to proceed on appeal in forma pauperis, the Court found these Defendants financially unable to afford the services of an attorney or to pay the costs of an appeal and granted their request. There was no opposition by the Government. After conferring with the Defendants, the Court appointed the same counsel that had originally been retained by the Defendants at their trial to represent them on appeal. Mr. Reynaldo S. Cantu, Jr., was appointed to represent MANUEL ALEMAN and Mr. J. Roberto Flores was appointed to represent Defendant GRACIELA FLORES.

The Court deferred ruling on Defendant JESUS BAZAN, JR.'S motion to proceed on appeal in forma pauperis because MR. BAZAN

failed to satisfy the procedural requirements of Federal Rules of Appellate Procedure 24 in petitioning this Court for his request. The record indicates that the prescribed affidavits necessary to show a person's inability to pay fees and costs had not been submitted with the accompanying motion. The Court in strictly adhering to the provisions of the rule and in leniently allowing the Defendant to file the prescribed affidavits dismissed the hearing and scheduled another hearing for January 8, 1986, at 2:00 p.m. The Court also deferred ruling on whether the transcript would be cost-free to the Defendants.

At the rescheduled hearing on January 8, 1986, before this Court, Mr. Robert L. Guerra appeared for the Government, Mr. Heriberto Medrano appeared for Defendant JESUS BAZAN, JR., and Mr. Reynaldo S. Cantu, Jr., court-appointed counsel, appeared for

Defendant MANUEL ALEMAN. Defendant GRACIELA FLORES was present at the hearing. Her court-appointed counsel, Mr. J. Roberto Flores, however, failed to appear on her behalf and also failed to notify the Court prior to his absence.

Defendant JESUS BAZAN, JR., in attempting to show his inability to pay the fees and costs necessary for the preparation of his appeal, presented the testimony of two witnesses. The first witness called to testify was San Juanita P. Bazan, wife of the Defendant. Her testimony consisted of a list of the financial holdings owned by the community estate or by the Defendant separately. Among the assets included in this list was a 500-acre ranch located in Starr County, Texas, which has now been seized by the U.S. Government. Other assets included certificates of deposit. One certificate of deposit in the amount of

$14,493.51 (See Defendant's Exhibit No. 1) is in the name of Jesus Bazan, Jr., and Juanita Bazan and is encumbered as security for a bank loan of $17,059.00 (See Defendant's Exhibit No. 2) from First National Bank in Rio Grande City, Texas. This loan was procured by Defendant on March 27, 1985, for agricultural purposes. Another certificate of deposit in the amount of $13,063.00 (See Defendant's Exhibit No. 3) is in the name of the Defendant's minor children and Defendant and his wife. This asset is unencumbered. It is also worth noting that when this certificate of deposit was purchased, the purchase agreement did not fall within the parameters of the Uniform Gifts to Minor Act, Tex. Rev. Stat. art. 5923-101 (Vernon 1962). Also listed among the financial holdings are four investment accounts deposited for Defendant's four minor children. These

assets also do not fall within the provisions of the Act, thus reserving to Defendant and his wife complete control over their disbursement. Three of these investment accounts, however, have been encumbered by a loan procured by Mrs. Bazan on September 25, 1985, (See Defendant's Exhibit No. 5). The primary purpose for the obtainment of the loan was to pay the expenses of Defendant's extensive trial. Other assets owned by the Defendant and his wife include farm equipment, motor vehicles and approximately twenty head of cattle. Mrs. Bazan concluded her testimony by informing the Court of the difficulty in securing financing to pay the expenses of an appeal.

The Court, after taking this matter under advisement, is of the opinion that the Defendant JESUS BAZAN, JR., is not indigent and therefore is not unable to finance the

preparation of his appeal to the United States Court of Appeals, 5th Circuit. The evidence submitted, combined with the testimony presented by the witnesses, convincingly establishes that Defendant BAZAN is not a pauper and is thus able to obtain financing. The liquidation of some of the Defendant's available assets should provide amply for the necessary funding to prepare an appeal and to retain a qualified appellate attorney.

For the foregoing reasons, it is respectfully recommended that Defendant BAZAN'S request to proceed in forma pauperis be DENIED. It is further recommended that the costs of Defendants ALEMAN'S and FLORES' transcripts be provided by the Government.

The Clerk will send copies of this Magistrate's Report and Recommendation to the parties, who have ten (10) days from receipt hereof to file written objections

thereto pursuant to General Order No. 80-5. Failure to file written objections within ten (10) days of receipt of this report shall bar an aggrieved party from attacking the factual findings on appeal.

DONE at Brownsville, Texas, this 4th day of February, 1986.

/s/ Fidencio G. Garza, Jr.

FIDENCIO G. GARZA, JR
UNITED STATES MAGISTRATE

NOTICE OF ACTION

United States Department of Justice
United States Parole Commission
Chevy Chase, MD 20815

NAME: FLORES, Graciela

INSTITUTION:
REGISTER NUMBER: 29025-079 Fort Worth

In the case of the above-named, the following parole action was ordered:
Continue to Expiration.

(REASONS/CONDITIONS)

Your offense behavior has been rated as Category Eight severity because it involved possession with intent to distribute cocaine in excess of 15 kilograms of 100% purity.

Your salient factor score is 9. You have been in federal custody a total of 13 months. Guidelines established by the Commission indicate a range of 100+ months to be served before release for cases with good institutional adjustment and program achievement. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted.

As required by law, you have also been scheduled for a statutory interim hearing during October, 1988.

SALIENT FACTOR SCORE (SFS-81): Your individual salient factor score items have

been computed as shown below. For an explanation of the salient factor score items, see reverse side of this form.

ITEM A [3]; B [2]; C [1( )*]; D [1];
E [1]; F [1] TOTAL SCORE = [9]

APPEALS PROCEDURE: You may appeal a decision to the National Appeals Board under 28 CFR 2.26.

October 23, 1986
(DATE)

South Central
(REGION)

VICTOR M. F. REYES
(COMMISSIONER)

va
(CLERK)